Public Prosecutor v Pung Chen Choon

SUPREME COURT (KUALA LUMPUR) — CRIMINAL REFERENCE NO 1 OF 1993
ABDUL HAMID OMAR LP, GUNN CHIT TUAN CJ (MALAYA), EDGAR JOSEPH JR, EUSOFF CHIN AND MOHAMED DZAIDDIN SCJJ
17 JANUARY 1994

Constitutional Law *— Fundamental liberties — Freedom of speech and expression — Whether s 8A of the Printing Presses and Publications Act 1984 imposed restrictions on the freedom of speech and expression — Whether constitutional — Printing Presses and Publications Act 1984 s 8A*

Constitutional Law *— Fundamental liberties — Freedom of speech and expression — Restrictions in s 8A of the Printing Presses and Publications Act 1984 — Whether pre-censorship and therefore unconstitutional — Printing Presses and Publications Act 1984 s 8A*

Constitutional Law *— Fundamental liberties — Freedom of speech and expression — Malicious publication of false news — Whether detrimental to internal security and public order*

Evidence *— Burden of proof — Presumption — Constitutional validity of s 8A of the Printing Presses and Publications Act 1984 — Printing Presses and Publications Act 1984 s 8A*

Statutory Interpretation *— Construction of statutes — Constitutionality of provisions — Approach courts will take*

The accused was prosecuted in the Magistrates' Court at Kota Kinabalu, upon the charge of maliciously publishing false news in *The Borneo Mail* dated 16 July 1990, an offence under s 8A(1) of the Printing Presses and Publications Act 1984 ('the Act'). At the close of the case for the prosecution, the defence had raised the question whether s 8A of the Act imposes restrictions on the right to freedom of speech and expression in violation of art 10(1)(a) and (2)(a) of the Federal Constitution ('the Constitution') and was therefore void under art 4(1). The magistrate being satisfied that the question of law raised by the defence concerned the effect of certain provisions of the Constitution, namely, art 10(1)(a) and (2)(a), directed that the proceedings before him be stayed and a record thereof be transmitted to the High Court pursuant to the provisions of s 30 of the Courts of Judicature Act 1964. The High Court judge decided to refer the following four questions of law to the Supreme Court for its determination by way of a special case in accordance with rr 33 and 34 of the Rules of the Supreme Court 1980:

(1) Whether s 8A(1) of the Act read with s 8A(2), imposes restrictions on the right to freedom of speech and expression conferred by art 10(1)(a) of the Constitution?

A (2) If so, whether the restriction imposed is one permitted by or under art 10(2)(a) of the Constitution.
(3) Whether s 8A(1) of the Act, read with s 8A(2), is consistent with art 10(1)(a) and (2)(a) of the Constitution and therefore, valid.
(4) Whether s 8A(2) of the Act, by presuming false news per se to be malicious, amounts to pre-censorship and accordingly, contravenes art 10(1)(a) and (2) of the Constitution.

Held, remitting the case to the magistrate with a direction to proceed with the hearing:
(1) It is clearly beyond argument that s 8A(1) of the Act does impose restrictions on the right to freedom of speech and expression conferred by art 10(1)(a) of the Constitution.
(2) It is clear law that there is a strong presumption of the constitutional validity of the impugned section and so the burden of proof lies on the party seeking to establish the contrary. Furthermore, where a law purports to authorize restrictions in language wide enough to cover restrictions both within and without the permissible limits of legislative action, it cannot be upheld, not even so far as it is applied within the constitutional limits, for it is impossible to apply the principle of severability. However, it is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the court would lean in favour of the former construction.
(3) In deciding whether a particular piece of legislation falls within the orbit of the permitted restrictions, consideration must be given to the question whether such law is directed at a class of acts too remote in the chain of relation to the subjects enumerated under art 10(2)(a). In other words, the objects of the impugned law must be sufficiently connected to the subjects enumerated under art 10(2)(a). The connection contemplated must be real and proximate, not far-fetched or problematical.
(4) Although it is true that not all false news even if maliciously published would fall within the orbit of the permitted restrictions enumerated under art 10(2)(a) of the Constitution, the malicious publication of false news could, inter alia, incite acts which threaten the internal security of the country, undermine Malaysia's friendly relations with other countries, lead to a disturbance of public order and incite the commission of offences. Therefore, s 8A of the Act could be supported as falling within the boundaries of permissible restrictions in art 10(2)(a) of the Constitution and was valid.
(5) Section 8A(2) of the Act is merely a reversal of onus provision which arises if the prosecution are able to prove that the news published is false and that the accused was its printer, publisher, editor or writer. Therefore, s 8A(2) being a statutory presumption which operates at the trial stage in order to assist the prosecution

by presuming malice upon proof of the falsity of the news published, can in no way be equated with pre-censorship which, if it takes place, can only do so before publication. Section 8A(2) does nothing to restrict freedom of the press either directly or indirectly. On the contrary, by providing for the rebuttal of the presumption of malice upon proof by the accused that he had taken reasonable measures to verify the truth of the news concerned before its publication, it promotes and ensures that freedom of the press is neither abused nor exploited.

[Bahasa Malaysia summary

Tertuduh telah didakwa di Mahkamah Majistret di Kota Kinabalu, atas tuduhan menerbitkan berita palsu dengan niat jahat di *The Borneo Mail* yang bertarikh 16 Julai 1990, suatu kesalahan di bawah s 8A(1) Akta Mesin Cetak dan Penerbitan 1984 ('Akta itu'). Pada penutup kes pihak pendakwa, pihak pembelaan telah menimbulkan soalan sama ada s 8A Akta itu mengenakan sekatan atas hak kebebasan bercakap dan mengeluarkan fikiran iaitu suatu pelanggaran perkara 10(1)(a) dan (2)(a) Perlembagaan Persekutuan ('Perlembagaan itu') dan oleh itu adalah tidak sah di bawah perkara 4(1). Majistret berpuas hati bahawa soalan undang-undang yang ditimbulkan oleh pihak pembelaan berkenaan dengan kesan peruntukan-peruntukan tertentu di dalam Perlembagaan itu, iaitu perkara 10(1)(a) dan (2)(a), dan telah memerintahkan supaya prosiding di hadapan beliau itu digantung dan suatu rekod mengenainya dihantar kepada Mahkamah Tinggi mengikut peruntukan s 30 Akta Mahkamah Kehakiman 1964. Hakim Mahkamah Tinggi membuat keputusan untuk merujuk empat soalan undang-undang berikut kepada Mahkamah Agung untuk keputusannya melalui suatu 'case stated' mengikut kk 33 dan 34 Kaedah-Kaedah Mahkamah Agung 1980:

(1) Sama ada s 8A(1) Akta itu dibaca dengan s 8A(2), mengenakan sekatan atas hak bercakap dan mengeluarkan fikiran yang dikurniakan oleh perkara 10(1)(a) Perlembagaan itu.
(2) Jika ya, sama ada sekatan yang dikenakan itu merupakan suatu sekatan yang dibenarkan oleh atau di bawah perkara 10(2)(a) Perlembagaan itu.
(3) Sama ada s 8A(1) Akta itu, dibaca dengan s 8A(2), konsisten dengan perkara 10(1)(a) dan (2)(a) Perlembagaan itu dan oleh itu adalah sah.
(4) Sama ada s 8A(2) Akta itu, dengan menganggap berita palsu per se berniat jahat, terjumlah kepada pra-penapisan, dan dengan demikian, melanggar perkara 10(1)(a) and (2) Perlembagaan itu.

Diputuskan, menghantar kes itu kepada majistret dengan suatu arahan supaya meneruskan pendengaran itu:
(1) Jelas tidak boleh dipertikaikan lagi bahawa s 8A(1) Akta itu mengenakan sekatan ke atas kebebasan bercakap dan

A mengeluarkan fikiran yang dikurniakan oleh perkara 10(1)(a) Perlembagaan itu.

(2) Adalah menjadi undang-undang mantap bahawa terdapat suatu anggapan kuat bahawa seksyen yang dipersoalkan itu sah di sisi perlembagaan, jadi beban membukti terletak atas pihak yang ingin menunjukkan sebaliknya. Lagipun, di mana sesuatu undang-undang bertujuan membenarkan sekatan dengan menggunakan bahasa yang cukup luas untuk meliputi sekatan yang terletak di dalam dan di luar had tindakan badan perundangan yang dibenarkan, ia tidak boleh dipertahankan walaupun ia dipakai mengikut had perlembagaan, kerana adalah mustahil untuk menggunakan prinsip keboleh asingan. Tetapi, adalah mantap bahawa jika peruntukan undang-undang tertentu ditafsirkan mengikut satu cara akan membuatkannya konsisten dengan Perlembagaan itu dan suatu tafsiran yang lain akan membuatkannya tidak berperlembagaan, mahkamah akan cenderung memihak kepada tafsiran yang pertama.

(3) Apabila memutuskan sama ada suatu undang-undang tertentu termasuk dalam orbit sekatan yang dibenarkan, pertimbangan mesti diberikan kepada soalan sama ada undang-undang itu ditujukan kepada suatu kelas tindakan yang terlalu di luar dugaan dalam rangkaian hubungan dengan perkara yang disebut di dalam perkara 10(2)(a). Dalam perkataan lain, objek undang-undang yang dipersoalkan itu mesti mempunyai hubungan secukupnya dengan perkara yang disebut dalam perkara 10(2)(a). Hubungan yang difikirkan itu mesti benar dan langsung, bukannya tidak masuk akal atau menyusahkan.

(4) Meskipun ianya benar bahawa bukan semua berita palsu walaupun diterbitkan dengan niat jahat akan terjatuh dalam orbit sekatan yang dibenarkan yang disebut dalam perkara 10(2)(a) Perlembagaan itu, penerbitan berita palsu dengan niat jahat mungkin, antara lain, mengapikan perbuatan yang menjejaskan keselamatan dalam negeri, melemahkan hubungan persahabatan Malaysia dengan negara lain, membawa kepada pengganguan ketenteraman awam dan mengapikan perbuatan melakukan jenayah. Oleh itu, s 8A Akta itu boleh dipertahankan sebagai terjatuh dalam lingkungan sekatan yang dibenarkan di dalam perkara 10(2)(a) Perlembagaan itu dan adalah sah.

(5) Seksyen 8A(2) Akta itu semata-matanya suatu peruntukan yang membalikkan beban membukti yang timbul jika pihak pendakwa dapat membuktikan bahawa berita yang diterbitkan itu adalah palsu dan tertuduh merupakan pencetak, penerbit, penyunting atau penulisnya. Oleh itu, s 8A(2) yang merupakan suatu anggapan statutori yang beroperasi pada peringkat perbicaraan untuk membantu pihak pendakwa dengan menganggap jahat niat apabila kepalsuan berita yang diterbitkan itu dibuktikan, tidak boleh disamakan dengan pra-penapisan, yang jika ianya berlaku, hanya boleh berlaku sebelum penerbitan. Seksyen 8A(2) tidak menyekat

kebebasan akhbar sama ada secara langsung atau tidak langsung. Sebaliknya, dengan membuat peruntukan untuk pematahan anggapan niat jahat apabila tertuduh membuktikan bahawa beliau telah mengambil langkah munasabah untuk menentusahkan berita berkenaan sebelum penerbitannya, ia menggalakkan dan memastikan supaya kebebasan akhbar tidak disalahguna atau dieksploitasikan.]

Notes

For cases on fundamental liberties, see 3 *Mallal's Digest* (4th Ed) paras 562–573.

Cases referred to

1 *Bennett Coleman v Union of India* AIR 1973 SC 107 (distd)
2 *Express Newspapers Pte Ltd & Anor v Union of India* [1959] SCR 12; AIR 1958 SC 578 (distd)
3 *Sakal Papers Pte Ltd & Ors v Union of India* AIR 1962 SC 305 (distd)
4 *Romesh Thappar v State of Madras* AIR 1950 SC 124 (refd)
5 *Leonard Hector v A-G of Antigua and Barbuda & Ors* [1990] 2 WLR 606; [1990] 2 AC 312; [1990] 2 All ER 103 (distd)
6 *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 (refd)
7 *Mian Bashir Ahmad & Ors v State of Jammu and Kashmir & Ors* AIR 1982 Jammu & Kashmir 26 (refd)
8 *Ram Singh v the State of Delhi* AIR 1951 SC 270 (refd)
9 *Assa Singh v Mentri Besar of Johore* [1969] 2 MLJ 30 (folld)
10 *PP v Param Cumaraswamy* [1986] 1 MLJ 512 (folld)
11 *Government of State of Kelantan v Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* [1963] MLJ 355 (refd)
12 *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (refd)
13 *PP v Ooi Kee Saik & Ors* [1971] 2 MLJ 108 (refd)
14 *Adegbenro v Akintola* [1963] 3 WLR 63; [1963] AC 614 (refd)
15 *PP v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 (folld)
16 *Kader Nath Singh v Bihar* AIR 1962 (Supp 2) SC 769 (folld)
17 *R v Solanke* [1969] 3 All ER 1383; [1970] 1 WLR 1 (refd)
18 *Ramji Lal Modi v State of Uttar Pradesh* AIR 1957 SC 620 (folld)
19 *PP v Oh Keng Seng* [1979] 2 MLJ 174 (refd)
20 *Pembangunan Maha Murni Sdn Bhd v Jurus Ladang Sdn Bhd* [1986] 2 MLJ 30 (refd)
21 *Kanu Biswas v the State of West Bengal* AIR 1972 SC 1656 (folld)
22 *Kishori Mohan Bera v the State of West Bengal* AIR 1972 SC 1749 (folld)
23 *Sk Kedar v State of West Bengal* AIR 1972 SC 1647 (folld)
24 *Brij Bhusan v State of Delhi* AIR 1950 SC 129 (refd)

Legislation referred to
Federal Constitution arts 4(2)(b), 10(1)(a), (2)(a)
Printing Presses and Publications Act 1984 s 8A
Indian Constitution art 19(1) [Ind]

Appeal from: Criminal Reference No 02 of 1991 (High Court, Kota Kinabalu)

Dato' Stanley Isaacs (*Wong Kian Kheong* with him) (Deputy Public Prosecutor) for the appellant.

Chong Kah Kiat (*Shelley Yap Leong Tseu Chong Chia & Co*) for the respondent.

Cur Adv Vult

Edgar Joseph Jr SCJ (delivering the judgment of the court): This was a Reference to the Supreme Court by way of a Special Case in accordance with rr 33 and 34 of the Rules of the Supreme Court 1980 by Syed Ahmad Idid J of the High Court, Borneo, sitting in Kota Kinabalu, under the provisions of s 48(1) of the Courts of Judicature Act 1964. The questions asked in the Reference were these:

(1) Whether s 8A(1) of the Printing Presses and Publications Act 1984 read with s 8A(2), imposes restrictions on the right to freedom of speech and expression conferred by art 10(1)(a) of the Federal Constitution?
(2) If so, whether the restriction imposed is one permitted by or under art 10(2)(a) of the Federal Constitution?
(3) Whether s 8A(1), read with s 8A(2), is consistent with art 10(1)(a) and (2)(a) of the Federal Constitution and therefore, valid?
(4) Whether s 8A(2), by presuming false news per se to be malicious, amounts to pre-censorship and accordingly, contravenes art 10(1)(a) and (2) of the Federal Constitution.

In this judgment, unless the context otherwise requires, we shall, for the sake of brevity and convenience, refer to the Printing Presses and Publications Act 1984 and to the Federal Constitution as 'the Act' and 'the Constitution', respectively.

Before embarking upon a consideration of the questions of law aforesaid, it will be desirable to set out the course which the proceedings had taken.

The accused, Pung Chen Choon, was prosecuted in the Magistrates' Court at Kota Kinabalu, before the first class magistrate, Mr P Ravinthran, upon the following charge:

> That you on 16 July 1990 at about 8am in Kota Kinabalu, Sabah, as editor of a newspaper *The Borneo Mail* was charged for maliciously publishing false news in *The Borneo Mail* dated 16 July 1990, ie a priest, Benjamin Basintol, had been arrested under the Internal Security Act 1960, one Roman Catholic priest, based in Keningau, is on the run from police arrest and several more other priests are also understood to be on the wanted list, and that you have thereby committed

an offence under s 8A(1) of the Printing Presses and Publications Act 1984 (Rev 1987) and punishable under the same Act. A

At the close of the case for the prosecution, the defence had raised the question whether s 8A of the Act imposes restrictions on the right to freedom of speech and expression in violation of art 10(1)(a) and (2)(a) of the Constitution and was therefore void under art 4(1). B

To put the matter in perspective, the provisions of the Act and the Constitution which it would be convenient to set out are s 8A(1), (2) and (3) of the Act and art 10(1)(a) and (2)(a) of the Constitution. These provisions read as follows:

8A (1) Where in any publication there is maliciously published any false news, the printer, publisher, editor and the writer thereof shall be guilty of an offence and shall, on conviction, be liable to imprisonment for a term no exceeding three years or to a fine not exceeding twenty thousand ringgit or to both. C

(2) For the purposes of this section, malice shall be presumed in default of evidence showing that, prior to publication, the accused took reasonable measures to verify the truth of the news. D

(3) No prosecution for an offence under this section shall be initiated without the consent in writing of the Public Prosecutor.

10 (1) ...

(a) every citizen has the right to freedom of speech and expression; ... E

(2) Parliament may by law impose —

(a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence; F
...

The magistrate being satisfied that the question of law raised by the defence concerned the effect of certain provisions of the Constitution, namely, art 10(1)(a) and (2)(a), directed that the proceedings before him be stayed and a record thereof be transmitted to the High Court pursuant to the provisions of s 30 of the Courts of Judicature Act 1964, with a view to their determination. G

When the matter came up before Syed Ahmad Idid J, his Lordship, after conferring with the deputy public prosecutor and counsel for the accused, decided to refer the four questions of law aforesaid to the Supreme Court for its determination. H

Question 1

Unlike the First Amendment to the Constitution of the United States of America, which makes express reference to the freedom of the press, the Constitution of Malaysia says nothing about the freedom of the press. The relevant portion of art 19(1) of the Indian Constitution says this: 'All citizens shall have the right: (a) to freedom of speech and expression; ...'. I

A Nevertheless, a consistent current of judicial opinion in India has established the proposition that art 19(1)(a) includes within its ambit the freedom of the press. (See, eg *Bennett Coleman v Union of India*,[1] *Express Newspapers Pte Ltd & Anor v Union of India*,[2] *Sakal Papers Pte Ltd & Ors v Union of India*.[3]) With this proposition we agree and indeed before us no attempt had been B made by senior federal counsel to argue the contrary.

We must now address this question. The government of this country has always recognized the important influence which the press exerts on the public mind, especially in the area of politics, and understandably, therefore, it has enacted laws which have imposed wide control over publications generally. A good example of this is the Act, which consolidates two pieces C of prior legislation, namely, the Printing Presses Act 1948 and the Control of Imported Publications Act 1958. A quick look at the Act will leave one in no doubt that it does impose restrictions over publications in general. More particularly, it is clear beyond argument, and indeed, senior federal counsel did not attempt to argue to the contrary, that s 8A(1) of the Act D does impose restrictions on the right to freedom of speech and expression conferred by art 10(1)(a) of the Constitution. We therefore answered this question in the affirmative.

Questions 2 and 3

E It would be more convenient to consider these questions together as the answer to Question 3 would, in our view, be consequential to the answer to Question 2.

Before us, it was contended by counsel for the accused that the crux of his case was that s 8A(1), read with s 8A(2) of the Act, clearly imposes a F blanket restriction against the publication of false news, without specifying or limiting its scope to within any of the permissible restrictions under art 10(2)(a) of the Constitution. In other words, s 8A(1) imposes a restriction against the publication of *all* false news irrespective of whether such false news comes within any of the permissible restrictions specified under art 10(2)(a) of the Constitution.

G In support of his contentions, counsel for the accused had directed our attention, inter alia, to the following authorities:

Romesh Thappar v State of Madras[4] where Patanjali Sastri J (as he then was) in delivering the majority judgment at p 127 para 8 said, inter alia, this:

H

> It was said that an enactment which provided for drastic remedies like preventive detention and ban on newspapers must be taken to relate to matters affecting the security of the State rather than trivial offences like rash driving or any affray. But whatever ends the impugned Act may have been intended to subserve, and whatever aims its farmers may have had in view, its application and scope I cannot, in the absence of limiting words in the statute itself, be restricted to those aggravated forms of prejudicial activity which are calculated to endanger the security of the State. Nor is there any guarantee that those authorized to exercise the powers under the Act will in using them discriminate between those who act prejudicially to the security of the State and those who do not.

And further down, at p 129 para 13 he said this:

> Where a law purports to authorize the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void. In other words, cl (2) of art 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to public security is involved, an enactment, which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional and valid to any extent.

Leonard Hector v A-G of Antigua and Barbuda & Ors[5] where Lord Bridge said this at p 611C:

> If, on the other hand, a particular false statement although likely to undermine public confidence in the conduct of public affairs is *not* likely to disturb public order, a law which makes it a criminal offence cannot be reasonably required in the interests of public order by reference to the remote and improbable consequences that it may possibly do so. Their Lordships are driven inexorably to the conclusion that the words in s 33B [of the Public Order Act 1972] 'or to undermine public confidence in the conduct of public affairs' offend against the Constitution and cannot therefore have any effect. (Emphasis provided.)

Dewan Undangan Negeri Kelantan v Nordin[6] where Abdul Hamid Omar LP said, inter alia, this at p 711B: 'It is axiomatic that the highest of motives and the best of intentions are not enough to displace constitutional obstacles ...'.

and later, at p 712B, his Lordship in approving the minority opinion delivered by Dr Anand in *Mian Bashir Ahmad & Ors v State of Jammu and Kashmir & Ors*[7] said:

> The most pertinent point of his Lordship's judgment on the correct approach to adopt in determining whether the impugned legislation violates the fundamental rights guaranteed under art 19(1)(c) of the Constitution was that (at p 59 para 101):
>
> > 'The legislation can be, of course, struck down if it directly infringes the fundamental rights of a legislator but it can also be struck down if the inevitable consequences of the legislation is to prevent the exercise of the fundamental rights guaranteed under art 19(1)(c) or to make the exercise of that right "ineffective or illusory".'

First of all, it is interesting to note — although nothing turns on this in the present case — that art 10(1)(a), (b) and (c) can only be relied upon to impugn legislation *directly* designed to restrict the Right guaranteed therein. It is therefore not necessary that legislation which *incidentally* restricts those Rights must be justified as falling within the permissible restrictions contemplated by cll (2)–(4) in art 10. So, for example, any law providing for imprisonment by way of punishment for the commission of a particular act or any law providing for preventive detention, of necessity results in the eclipse or a restriction of all or most of the Rights enunciated in art 10(1)

A but that does not entitle a person against whom such a law is enforced to contend that his Rights under art 10(1) have been restricted for some purpose outside the permissible restrictions contemplated by cll 2–4 in art 10, if the restriction is incidental. He may only so contend if the penal law or the preventive detention law concerned is aimed at *directly* restricting any one or more of his Rights guaranteed under art 10(1). (See, eg *Ram Singh* B *v the State of Delhi.*[8]) Whether or not he is correct in his contentions will, of course, depend upon the particular circumstances of each case.

We should like to make it clear, however, that art 10(1) assumes that the citizen to whom the Rights set out therein are guaranteed retains the personal liberty upon which the enjoyment of such Rights depends; if, C therefore, he is deprived of his personal liberty by due process of law, no question of his enforcing such Rights can arise.

The second general observation we should like to make is that the first clause of art 10 enumerates the three Rights available to citizens only; namely, the Right to freedom of speech and expression, the Right to assemble peaceably and without arms, and the Right to form associations. D

Then follow three other clauses setting out the permissible restrictions. Insofar as restrictions on the Right to freedom of speech and expression is concerned, cl (2)(a) of art 10 permits restrictions on this Right by laws as Parliament deems necessary or expedient relating to matters undermining the security of the Federation or any part thereof, friendly relations with E other countries, public order or morality or relating to defamation, incitement to any offence, contempt of court, privileges of Parliament or of any legislative assembly.

Clearly, therefore, in Malaysia, the position of the court when considering an infringement of this Right is different from that of the position of the court in India when considering an infringement of the equivalent Right F under the Indian Constitution.

With regard to India, the Indian Constitution requires that the restrictions, even if within the limits prescribed, must be 'reasonable' — and so that court would be under a duty to decide on its reasonableness. But, with regard to Malaysia, when infringement of the Right of freedom of speech G and expression is alleged, the scope of the court's inquiry is limited to the question whether the impugned law comes within the orbit of the permitted restrictions. So, for example, if the impugned law, in pith and substance, is a law relating to the subjects enumerated under the permitted restrictions found in cl 10(2)(a), the question whether it is reasonable does not arise; the law would be valid. Moreover, by cl (2) of art 4, it is not a ground for H challenge that the restriction does not relate to one of the matters specified in art 10(2)(a) for taking a case outside the protection of that article. (See *Assa Singh v Mentri Besar of Johore*[9] at p 38.)

To put it another way, art 4(2)(b) of the Constitution expressly prohibits the questioning of the validity of any law on the ground that such a law I 'imposes restrictions as are mentioned in art 10(2) of the Federal Constitution but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in art 10(2)'. (See *PP v Param Cumaraswamy*[10] at p 517 col 2F–G.)

It follows that the position of the press under our Constitution is not as free as the position of the press under the Indian Constitution and more so when compared to the position of the press in England or the United States of America. This, of course, means that the Indian cases and the Privy Council case of *Leonard Hector v A-G of Antigua and Barbuda & Ors*[5] relied on by counsel for the accused, are of little relevance and need not be discussed. In saying so we are fortified by what Thomson CJ said in *Government of State of Kelantan v Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj*[11] at p 358 col 1J. What he said was this:

> ... the Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia.

Instances of the application of this approach when interpreting our Federal Constitution are to be found in *Loh Kooi Choon v Government of Malaysia*[12] at p 189 col 1A and *PP v Ooi Kee Saik & Ors*[13] at p 113 col 2B–C. Indeed the same point was recognized and applied by the Privy Council (per Lord Radcliffe) in *Adegbenro v Akintola*[14] at p 73.

In considering this question, we had also kept in the forefront of our minds, on the one hand, the principle that the Right to freedom of speech and expression as enshrined in art 10(1)(a) of the Constitution is not absolute because the Constitution authorizes Parliament to impose certain restrictions, as it deems necessary, and which so far as might be material to this Reference, are the interest of security of the Federation or any part thereof or friendly relations with other countries, public order or morality and, on the other hand, the principle that any restriction limiting the fundamental Right of free speech and expression not falling within the four walls of art 10(2)(a), cannot be valid.

We must now embark upon a consideration of what counsel for the accused was pleased to describe as 'the crux' of his case and which was that s 8A(1) read with s 8A(2) of the Act imposes a blanket restriction against the publication of *all* false news without specifying or limiting its scope to within any of the permissible restrictions under art 10(2)(a) of the Constitution. For brevity and convenience, we shall refer to this contention of counsel as 'the blanket restriction point'.

First of all, it is clear law that there is a presumption — perhaps even a strong presumption — of the constitutional validity of the impugned section and so the burden of proof lies on the party seeking to establish the contrary. (See *PP v Datuk Harun bin Haji Idris & Ors.*[15])

Secondly, we endorse the proposition that, where a law purports to authorize restrictions in language wide enough to cover restrictions both within and without the permissible limits of legislative action, it cannot be upheld, not even so far as it is applied within the constitutional limits, for it is impossible to apply the principle of severability. (See *Romesh Thapper v State of Madras.*[4]) But we hasten to add that we adhere to the principle enunciated by the Supreme Court of India in *Kader Nath Singh v Bihar,*[16] that it is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another

A interpretation would render them unconstitutional, the court would lean in favour of the former construction.

Having said that, we had to go further and consider the provisions of the Act generally, and s 8A(1) in particular, to determine whether the impugned law was within the perimeters of the permissible restrictions envisaged by art 10(2). In so doing, we were of the view that it was impossible to lay B down an abstract standard applicable to all cases. It would be the duty of the court to consider each impugned law separately, regard being had to the nature of the Right alleged to have been infringed, the underlying purpose of the restriction, the extent and the urgency of the evil sought to be remedied, not forgetting the prevailing conditions of the time. We hasten to C add that it is not that the meaning of the words in the impugned law changes with the prevailing conditions of the time but that the changing circumstances illustrate and illuminate the full import of that meaning.

It was with the above principles in mind that we turned to consider the blanket restriction point advanced by counsel for the accused.

We regret we could not agree that s 8A(1) even if read with s 8A(2), D imposes a blanket restriction against the publication of *all* false news.

It was obvious that publications intended to be hit by s 8A(1) of the Act were *only* those wherein were *maliciously* published any false news. In other words, the mere publication of false news in any publication is not an offence under s 8A(2). To be so, the false news must have been maliciously E published.

We did not consider it necessary for purposes of the present Reference to determine what element of mens rea is required to be proved for an offence under s 8A(1). However, we would remark that a quick look at the Act shows that the word 'maliciously' is nowhere defined therein, but we think it would not be incorrect to say that the word 'maliciously' in the context of F s 8A(1), bears its ordinary meaning in Acts creating criminal offences, namely, wilfully or intentionally and without lawful excuse. (See *R v Solanke*[17] at p 1384.)

We do not consider it strange that for a printer, publisher, editor or writer to maliciously publish any false news in any publication is a wrongful G act and, prima facie, so wicked and inherently likely to fall within the permissible restrictions defined in art 10(2)(a), that it should be made a crime under s 8A(1) of the Act. However, whether it does amount to such a crime in a particular case must depend upon the particular circumstances of that case.

As for the presumption under s 8A(1) that malice shall be presumed in H default of evidence showing that prior to publication, an accused had taken reasonable measures to verify the truth of the news, this is merely a reversal of onus provision, designed to assist the prosecution in establishing a case to answer, if, but only if, it is proved that the news concerned is false. It does not relieve the court of the duty of having to be satisfied, at the close I of the case for the defence, that the element of malice within the meaning of s 8A(1), has been established beyond all reasonable doubt. It was therefore incorrect for counsel to have prayed in aid s 8A(2) in support of his submission that s 8A(1) imposed criminal liability in respect of the publication of *all* false news in violation of art 10(1)(a) of the Constitution.

In considering whether the impugned s 8A(1) comes within the orbit of the permitted restrictions set out in cl 10(2)(a) of the Constitution, on the Right to freedom of the press, it is necessary for the court to determine whether this impugned provision is in pith and *substance* a law passed by Parliament to restrict such Right as Parliament deems necessary or expedient 'in the interest of' the security of the Federation or any part thereof; friendly relations with other countries; public order or morality or the impugned provision is in pith and substance a law 'to provide against' contempt of court, defamation or incitement to any offence.

By cl (2)(a) of art 10, challenge to any law is restricted by art 4(2)(b) which says: 'The validity of any law shall not be questioned on the ground that it imposes such restrictions as are mentioned in Article 10(2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.' This means that it is not open to any court to enquire into the question whether Parliament deems or does not deem anything. Nevertheless, as has been aptly put by Prof LA Sheridan and Prof Harry E Groves in their book on the *Constitution of Malaysia* (4th Ed) at pp 74 and 74, a law which purports to have been passed under cl (2) is open to challenge on the ground that it is *not in any of the interests set out in the clause* since any other, more extensive meaning to be assigned to art 4(2)(b) would render art 10(2) otiose.

We regret, therefore, that we cannot accede to the submission of the senior federal counsel that our courts are precluded by art 4(2)(b) of the Constitution from questioning the validity of s 8A of the Act once such a provision is passed 'in the interest of' any subject-matter enumerated in the first part of art 10(2)(a) or once such a provision is designed 'to protect or provide against' any subject-matter enumerated in the second part thereof.

We must now revert to the blanket restriction point advanced by counsel for the accused which, it will be recalled was that because s 8A(1) of the Act imposed a blanket restriction on the publication of all false news — we would interpolate, more correctly — the *malicious* publication of all false news — without qualifying the scope of such news, it violated the Right conferred by art 10(1), since not all false news even if published maliciously, would be against the interests of the security of the Federation, public order, morality or any of the other permitted restrictions set out in art 10(2)(a).

In our view, as we have earlier indicated, the position which we took in considering this part of the case was whether the impugned law — in this case, s 8A(1) — came within the orbit of the permitted restrictions. If, therefore, s 8A(1) was in pith and substance a law falling under one of the interests enumerated under art 10(2)(a), the question whether its provisions were reasonable did not arise; it (s 8A(1)) would be valid. It follows, therefore, that in this regard, the court has a limited power of judicial review to the extent that it is entitled to decide whether s 8A(1) infringes the Right to freedom of speech and expression enunciated in art 10(1)(a).

The difficulty which faced counsel for the accused was that although a court is entitled to decide the question whether a particular piece of legislation falls within the orbit of the interests enumerated under art 10(2)(a), if the law is directed at a class of acts in the interests of, say, public order, there

A is authority for saying that it does not violate the Right enunciated in art 10(1)(a) even if some of the acts may *not* lead to public disorder. (See *Ramji Lal Modi v State of Uttar Pradesh.*[18])

The particular passage in the judgment of SR Das CJ who was speaking for the Supreme Court in *Ramji Lal Modi,*[18] to which we should like to refer is as follows:

B

> Learned counsel then shifted his ground and formulated his objection in a slightly different way. Insults to the religion or the religious beliefs of a class of citizens of India, may, says learned counsel, lead to public disorders in some cases, but in many cases they may not do so and, therefore, a law which imposes restrictions on the citizens' freedom of speech and expression by simply making
> C insult to religion an offence will cover both varieties of insults, ie those which may lead to public disorders as well as those which may not. The law in so far as it covers the first variety may be said to have been enacted in the interests of public order within the meaning of cl (2) of art 19, but in so far as it covers the remaining variety will not fall within that clause. The argument then concludes that so long as the possibility of the law being applied for purposes not sanctioned
> D by the Constitution cannot be ruled out, the entire law should be held to be unconstitutional and void. We are unable, in view of the language used in the impugned section, to accede to this argument. In the first place cl (2) of art 19 protects a law imposing reasonable restrictions on the exercise of the right to freedom of speech and expression 'in the interests of public order', which is much wider than 'for maintenance of' public order. If, therefore, certain activities
> E have a tendency to cause public disorder, a law penalizing such activities as an offence cannot but be held to be a law imposing reasonable restriction 'in the interests of public order' although in some cases those activities may not actually lead to a breach of public order.

We would think of no distinction in principle why the same test of
F infringement of the Right of freedom of speech and expression enunciated under art 10(1)(a), should not be applied when considering whether a particular piece of legislation comes within the orbit of the *other* permitted restrictions.

Having said that, we recognized that in deciding whether the particular piece of legislation falls within the orbit of the permitted restrictions,
G consideration must be given to the question whether such law is directed at a class of acts too remote in the chain of relation to the subjects enumerated under art 10(2)(a). In other words, the objects of the impugned law must be sufficiently connected to the subjects enumerated under art 10(2)(a). The connection contemplated must be real and proximate, not far-fetched or problematical.

H It is true that not all false news even if maliciously published would fall within the orbit of the permitted restrictions enumerated under art 10(2)(a) of the Constitution, but it cannot be gainsaid that some such news would be.

By way of illustration, senior federal counsel gave a number of examples
I falling within the latter category and these can, for convenience, be taken in substance from his written submission.

Regarding the power to restrict this Right 'in the interest of' *the security of the Federation or any part thereof,* it was said, and we agreed, that the

malicious publication of false news could cause, inter alia, hatred or disaffection amongst Malaysian people, which in turn may lead to unrest and this could undermine the security of the Federation or any part thereof. Similarly, the malicious publication of false news may also incite acts or omissions which could directly or indirectly threaten the internal security of the country or any part thereof. (See *PP v Oh Keng Seng*[19] at p 177 col 2A–B.)

Regarding the power to restrict this Right 'in the interest of' *friendly relations with other countries*, it was said, and we agreed, that it is self-evident that the malicious publication of false news concerning another country could undermine Malaysia's friendly relations with such country. (See *PP v Oh Keng Seng*[19] at p 177 col 2B–C.)

Regarding the power to restrict this Right 'in the interest' of *public order*, it was said, and we agreed, that the malicious publication of false news would — we would interpolate to remark that it would be more accurate to say not 'would' but 'could' — lead to the disturbance of the current life of the community so as to amount to disturbance of public order. In this context — so ran the argument — the court could take judicial notice that Malaysian society is multiracial, multicultural and multireligious. (See eg *Pembangunan Maha Murni Sdn Bhd v Jurus Ladang Sdn Bhd*[20] at p 31 col 2H–p 32 col 1C.) By way of illustration, mention was made of the malicious publication of false news touching on sensitive issues which may cause disaffection or discontent in a cosmopolitan society, which in turn may lead to the disturbance of the current life of the community resulting in disturbance of public order.

Regarding the power to restrict this Right 'in the interest' of *public order*, the Supreme Court of India in *Kanu Biswas v the State of West Bengal*,[21] at pp 1658–1659 said that the test to be adopted in determining whether an act affects law and order or public order is: Does it lead to disturbance of the current life of the community so as to amount to disturbance of public order or does it affect merely an individual leaving the tranquility of society undisturbed? So, also, in *Kishori Mohan Bera v the State of West Bengal*,[22] it was said that the true test is not the kind but the potentiality of the act in question. And, in *Sk Kedar v State of West Bengal*,[23] it was held that in relation to public order the determinant factor is one of degree and the extent of the reach of the act upon society and not merely the nature or quality of the act.

We considered that the test enunciated in the three last mentioned cases decided by the Supreme Court of India could be usefully adopted in determining whether an act affects public order.

Regarding the power to restrict this Right by law passed by Parliament 'to provide against' *defamation* under art 10(2)(a), it was said, and we agreed, that the malicious publication of false news which defames the reputation of any Malaysian citizen would, prima facie, attract criminal liability under s 8A of the Act and so, on this ground also, s 8A could be supported as falling within the boundaries of permissible restriction. (See *PP v Oh Keng Seng*[19] at p 177 col 2A.)

Regarding the power to restrict this Right by law passed by Parliament 'to provide against' *incitement to any offence*, under art 10(2)(a), it was said,

A and we agreed, that the malicious publication of false news could incite the commission of an offence and so, on this further ground also, s 8A of the Act could be supported as falling within the boundaries of permissible restriction.

For the reasons stated, our answer to Question 2, was in the affirmative and, as we have said, since Question 3 raised a consequential issue arising B from question 2, our answer to Question 3 had, inevitably, to be also in the affirmative.

Question 4

C Our first thought was that this question did not arise having regard to the issues raised by Questions 1–3 and so did not require an answer. However, reflection reveals that we should answer this question as it does raise a separate and distinct issue of public importance which arose acutely for decision in the magistrates' court where it was argued and again before us where it was argued more fully. We also note that in the High Court, the D judge, had answered this question against the accused, though without the benefit of hearing arguments.

Moreover, if counsel for the accused is correct in his contentions regarding question 4, it would be a complete answer to the charge under s 8A(1) of the Act because, in the words of Patanjali Sastri J (as he then was) in *Brij* E *Bhusan v State of Delhi*[24] at p 134 para 25:

> There can be little doubt that the imposition of pre-censorship on a journal is a restriction on the liberty of the press which is an essential part of the right of freedom of speech and expression declared under art 19(1)(a). [Equivalent to our art 10(1)(a).]
>
> As pointed out by Blackstone in IV *Commentaries* at pp 151 and 152: F
>
> > 'the liberty of the press consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matters when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public, to forbid this is to destroy the freedom of the press.'

G We have already noted that s 8A(2) of the Act is merely a reversal of onus provision which arises if, but only if, the prosecution are able to prove at the trial of an accused who is prosecuted for an offence under s 8A(1), that the news published is false and that he was its printer, publisher, editor or writer.

H Clearly, therefore, s 8A(2) being a statutory presumption which operates at *the trial stage* in order to assist the prosecution by presuming malice upon proof of the falsity of the news published, can in no way be equated with pre-censorship which, if it takes place, can only do so *before* publication. Section 8A(2) does nothing to restrict freedom of the press either directly I or indirectly. On the contrary, by providing for the rebuttal of the presumption of malice upon proof by the accused that he had taken reasonable measures to verify the truth of the news concerned before its publication — a standard practice of responsible journalists — it promotes and ensures that freedom of the press is neither abused nor exploited.

It follows, therefore, that our answer to this question should be 'No'.

We accordingly remitted the case to the magistrate with a direction to proceed with the hearing thereof, regard being had to our answers to the questions posed in the Reference to us.

We need hardly add, since it goes without saying, that the magistrate will have to make up his own mind whether, upon the evidence before him, the offence charged has been established by the prosecution beyond all reasonable doubt.

Order accordingly.

Reported by Prof Ahmad Ibrahim